



M/057/0002  
cc: Lynn  
Task 4405

## WESTERN RESOURCE ADVOCATES

September 27, 2011

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RECEIVED

SEP 28 2011

DIV. OF OIL, GAS & MINING

Re: Large Mine Permit Consolidation: Great Salt Lake Minerals Corporation Permit M/057/002

Mr. Baker:

I write this letter on behalf of FRIENDS of Great Salt Lake (FRIENDS) regarding concerns with the proposed Consolidation Permit for Great Salt Lake Minerals Corporation (GSLM). In general, we applaud the Division of Oil, Gas & Mining's (DOGM) attempt to become more efficient by consolidating multiple GSLM permits into a single permit. However, it appears that the company is attempting to use this effort to make a substantial change to the character of its operations without proper review and without implementing sufficient reclamation measures.

Specifically, I refer to what GSLM has dubbed Phase II of its expansion plan: the lining of the outer walls of the company's Bear River Bay outer dikes with a concrete/bentonite cutoff wall. The Phase II expansion was announced by GSLM as a way of increasing the efficiency of its operation and decreasing the amount of water it uses. In principle, FRIENDS supports the company's effort to increase its efficiency as a means of increasing its production within its current footprint rather than expanding its operation within the confines of Great Salt Lake. However, the proposal as outlined does not address – in any way, let alone adequately – the company's legal obligation to reclaim the lakebed of Bear River Bay. See Utah Admin. Code R647-4-110 & 113. Additionally, FRIENDS is concerned that DOGM will not subject approval of the Phase II expansion to public notice and comment pursuant to R647-4-116. Our concern is that DOGM will instead choose to classify GSLM's proposal as an amendment – an insignificant change – to its existing permit under the terms of R647-4-119. We address each of these issues in turn below.



## Obligation to Protect Public Trust Resources

As you no doubt are aware, the bed of Great Salt Lake is sovereign land held in trust for the people of Utah under the Public Trust Doctrine. The State of Utah and each of its executive agencies have unique obligations to protect sovereign lands, such as the bed of Great Salt Lake, and the Public Trust values they support. Under Article XX § 1 of the Utah Constitution, sovereign lands are held in public trust.<sup>1</sup> The Utah Supreme Court has interpreted the Public Trust Doctrine, which sets forth federal and state law with regard to sovereign lands, as follows: "The essence of this doctrine is that navigable waters should not be given without restriction to private parties and should be preserved for the general public for uses such as commerce, navigation, and fishing." *Colman v. Utah State Land Board*, 795 P.2d 622, 635 (Utah 1990) (citing *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 13 S.Ct. 110 (1892) as "the controlling case" on the Public Trust). The Utah Supreme Court later elaborated that "[t]he 'public trust' doctrine . . . protects the ecological integrity of public lands and their public recreational uses for the benefit of the public at large." *National Parks and Conservation Ass'n v. Board of State Lands*, 869 P.2d 909, 919 (Utah 1993) (citing, *Colman*, 795 P.2d at 635-36).

*Illinois Central* characterized the Public Trust Doctrine as:

a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the state may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state.

*Illinois Central R.R. Co. v. Illinois*, 146 U.S. at 452; 13 S.Ct. at 118.

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<sup>1</sup> This constitutional provision states: "All lands of the State that have been, or may hereafter be granted to the State by Congress, and all lands acquired by gift, grant or devise, from any person or corporation, or that may otherwise be acquired, are hereby accepted, and, except as provided in Section 2 of this Article, are declared to be the public lands of the State; and shall be held in trust for the people, to be disposed of as may be provided by law, for the respective purposes for which they have been or may be granted, donated, devised or otherwise acquired."



Case law in the states has uniformly required that state-owned submerged lands be alienated or encumbered only for public purposes. See *Kootenai Env'tl. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 671 P.2d 1085, 1089 (1983) (grant of public trust property must be made in the "aid of navigation, commerce, or other trust purposes."); *Morse v. Oregon Division of State Lands*, 285 Or. 197, 590 P.2d 709 (1979) (fill may be for non-water-related purposes so long as public need for project outweighs interference with traditional trust purposes); *State v. Public Service Commission*, 275 Wis. 112, 81 N.W.2d 71, 73-74 (1957) ("In [upholding a grant of an interest in submerged lands], we attach importance to these facts: (1) Public bodies will control the use of the area. (2) The area will be devoted to public purposes and open to the public .... (4) No one of the public uses of the lake ... will be destroyed or greatly impaired. (5) The disappointment of those members of the public who may desire to boat, fish or swim in the area to be filled is negligible when compared with the greater convenience to be afforded those members of the public who use the city park."); *City of Berkeley v. Superior Court of Alameda County*, 26 Cal.3d 515, 162 Cal.Rptr. 327, 606 P.2d 362, 373 (1980) ("[The] principle we apply is that the interests of the public are paramount in property that is still physically adaptable for trust uses ...."); see generally *The Public Trust Doctrine in Natural Resources Law and Management: A Symposium*, 14 U.C.Davis L.Rev. 181 (1980).

The Utah agency directly responsible for overseeing the protection of the bed of Great Salt Lake as a Public Trust resource is the Division of Forestry, Fires & State Lands (DFFSL). Utah statute, which must be interpreted as consistent with Utah case law, provides that DFFSL "may exchange, sell, or lease sovereign lands **but only in the quantities and for the purposes as serve the public interest and do not interfere with the public trust.**" Utah Code Ann. § 65A-10-1(1) (emphasis added). The DFFSL regulation interpreting this provision states:

The state of Utah recognizes and declares that the beds of navigable waters within the state are owned by the state and are among the basic resources of the state, and that there exists, and has existed since statehood, a public trust over and upon the beds of these waters. It is also recognized that the public health, interest, safety, and welfare require that all uses on, beneath or above the beds of navigable lakes and streams of the state be regulated, so that the protection of navigation, fish and wildlife habitat, aquatic beauty, public recreation, and water quality will be given due consideration and balanced against the navigational or economic necessity or justification for, or benefit to be derived from, any proposed use.

Utah Admin. Code R652-2-200.

These provisions, understood in the context of the mandates laid down by the Utah Supreme Court, require first and foremost that sovereign lands and the values they embody – navigation, fish and wildlife habitat, aquatic beauty, public recreation, and water quality – must be protected and cannot be interfered with. E.g. *NPCA v. Board of State Lands*, 869 P.2d at 919 ("The 'public trust' doctrine . . . protects the ecological integrity of public lands and their public recreational uses for the benefit of the public at



large.”); Utah Code Ann. § 65A-10-1(1) (sovereign lands may be leased “only in the quantities and for the purposes as serve the public interest and do not interfere with the public trust.”). Alienation of or encumbrances on sovereign lands are only appropriate if they directly serve public purposes that enhance or aid public trust values – navigation, fish and wildlife habitat, aquatic beauty, public recreation, and water quality. *Illinois Central R.R. Co. v. Illinois*, 146 U.S. at 452; 13 S.Ct. at 118.

### **Inadequacy of Reclamation Plan for Phase II Improvements**

The proposal by GSLM to install miles of concrete/bentonite cutoff walls in its Phase II expansion – without adequate reclamation – constitutes a clear violation of the Public Trust Doctrine because a failure to remove GSLM’s dikes within a reasonable timeframe after mining ceases will significantly interfere with Trust values. Although the Reclamation Plan contained within the Consolidated Permit specifically calls for the return of the diked area within Bear River Bay to natural lakebed, there is nothing in the Consolidated Permit that provides for removal of the cutoff walls. See Consolidated Permit at 22, <http://linux1.ogm.utah.gov/WebStuff/wwwroot/minerals/mineralsfilesbypermit.php?M0570002>. There is no description in the Consolidated Permit outlining how the company proposes to remove the cutoff walls, and no evidence that financial surety of any amount has been determined, approved or obtained to address removal of the walls.

As it currently stands, the Reclamation Plan calls for breaching the dikes “at certain points to remove the salt deposits” and allowing wave action over time to wash-out and level the dikes. *Id.* However, although GSLM describes the cutoff walls as “thin,” *id.* at 6, they are, in fact, 20” thick. See October 14, 2010 Meeting Notes, <http://linux1.ogm.utah.gov/WebStuff/wwwroot/minerals/mineralsfilesbypermit.php?M0570002>. Certainly it is unreasonable to presume that wave action alone will wash-out and level miles of concrete walls nearly 2’ thick. Pursuant to Utah Admin. Code R647-4-110 & 113, DOGM must ensure that GSLM fulfills its legal obligation to reclaim its footprint in Bear River Bay. Allowing these walls to remain in place and not providing for adequate reclamation would clearly interfere with all of the Public Trust values DFFSL is required to protect: navigation, fish and wildlife habitat, aquatic beauty, public recreation, and water quality. In order to correct this, DOGM must ensure that GSLM outlines an adequate plan for removing 100% of the Phase II cutoff walls and that the company has sufficient financial surety in place to provide for their removal should GSLM cease operations. This reclamation must occur within a specific, pre-approved timeframe and not – as the Reclamation Plan suggests – at some indefinite point in time after mining ceases. By allowing the continued existence of miles of concrete lined dikes in Bear River Bay, DOGM would be allowing the Public Trust values of navigation, fish and wildlife habitat, aquatic beauty, public recreation, and water quality to be impaired and would be in violation of the Utah Mined Land Reclamation Act and its own regulations.



### **Inadequacy of Reclamation Plan as Currently Proposed**

In addition to failing to address the Phase II design change, the Reclamation Plan as written is inadequate to reclaim the dikes as they currently exist, and DOGM is obligated to correct that deficiency. As noted above, the current Reclamation Plan calls for leaving all dikes in place and allowing wave action to wash-out and level the dikes. However, the reality is that GSLM has, over the years, installed extensive rip-rap on the exterior of their outer dikes specifically to protect against the erosive effects of wave action. The Reclamation Plan, as written, does not encompass this design change. In order to account for GSLM's installation of rip-rap on the exterior dike walls within Bear River Bay, DOGM must require GSLM to submit a Reclamation Plan that outlines how GSLM intends to remove this rip-rap to allow wave action to reclaim the dike walls when the time comes. DOGM must also ensure that sufficient financial surety is in place to accomplish this reclamation.

The current Reclamation Plan also does not account for the existence of the extensive network of interior dikes within GSLM's operation. GSLM has approximately 90 ponds located within GSLM's Bear River Bay operations, and in some cases there are up to a dozen individual dikes between the outer dike wall and the shoreline. With the design of GSLM's operations as they now exist, it is unreasonable for DOGM to assume that wave action will reclaim the entire extent of the network of dikes within Bear River Bay within anything approaching a reasonable timeframe. DOGM must therefore require GSLM to submit something more than a passive Reclamation Plan that describes how the company intends to remove the network of existing interior walls, and DOGM must ensure that sufficient financial surety is in place to accomplish this reclamation.

### **DOGM Needs to Provide Adequate Notice and Comment Opportunity**

As part of its approval process, DOGM must provide adequate notice and comment opportunity. In the past, the threshold issue has been how DOGM applied the provisions of R647-4-119 and specifically whether the Division deemed a proposed change in an existing permit as "insignificant." If it was, the change would be classified as an amendment to an existing plan and public notice and comment would not be provided for. Given the potential impact of the Phase II changes, it would be improper for DOGM to classify the installation of concrete/bentonite cutoff walls as insignificant and process the proposal as an amendment to GSLM's existing permit. The proposed Phase II cutoff walls, and the reclamation issues associated with removal of those walls, deserve public scrutiny. This is particularly true given the impact to the Public Trust resources of this proposal. The beneficiaries of the Public Trust – the citizens of Utah – deserve an opportunity to comment on this change in GSLM's permit.

Additionally, we encourage DOGM to consult with other State agencies regarding the provisions of the Consolidated Permit, and especially the impact of the Phase II proposal on the Public Trust resources. As currently proposed, and without proper reclamation, the existence of the cutoff walls within Bear River Bay will have serious implications to all Public Trust values in Bear River Bay, and agencies such as DFFSL



and the Division of Water Quality – just to name two – should be given an opportunity to comment on this proposal.

Yours,

A handwritten signature in black ink, appearing to read 'Rob Dubuc', with a stylized, cursive script.

ROB DUBUC  
JORO WALKER  
Attorneys for FRIENDS